CASE NO. 88-1905

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1988

EDDIE KELLER, et al.,

*Petitioners,*

*vs.,*

STATE BAR OF CALIFORNIA, et al.,

*Respondents.*

*ON WRIT OF CERTITORARI TO THE CALIFORNIA SUPREME COURT*

# BRIEF OF AMICUS CURIAE, GIBSON, IN SUPPORT OF PETITIONER

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## INTEREST OF AMICUS CURIAE

Gibson files this brief in support of the position of petitioner, KELLER. Consent has been procured for the filing of this brief from the parties hereto, and has been filed with the Clerk.

Amicus Curiae Robert E. Gibson is a member of the Florida Bar in good standing, and has been a member for 25 years. The Florida Bar, like the California Bar, requires payment of a yearly membership fee, part of which is used for lobbying on ideological issues unrelated to its purpose and beyond its authority to use compulsory fees therefor. [This statement is a matter of record, See *Gibson* v. *The Florida Bar*, 789 F.2d 1564(11th. Cir. 1986) at page 1565.] Gibson objects to the use of his dues for the purpose of lobbying, and, as noted above, has sued under the Civil Rights Act to protect his rights. Gibson currently has his case on Appeal on the question of remedy, which case has been taken under advisement after argument by the Eleventh Circuit. Gibson urges that the First Amendment is applicable to California's regulatory scheme, and especially desires to inform the Court on the issue of remedy.

## SUMMARY OF ARGUMENT

The California Supreme Court's decision in this matter is in error, as it countenances a violation of the First Amendment rights of Californians who are otherwise eligible for Bar admission, or to practice law, but who do not wish to financially contribute to support the ideological / political / lobbying activities of the California Bar unrelated to lawyer regulation and administration of the legal system.

The payment of bar dues, however they are characterized, is for purposes of First Amendment analysis, identical to union fees in "union shops" and is not a general tax. The State of California cannot condition the fundamental right to exercise a lawful profession by requiring a waiver of a constitutional right. In the present case, the State of California, whether acting through its legislature or through its Courts, cannot mandate that attorneys waive their First Amendment rights as a precondition of practicing law, so long as they are otherwise qualified.

The fact that a legislature authorizes such violations, rather than a Supreme Court acting within its inherent authority to regulate the Bar is superfluous to the inquiry. As noted in a long line of decisions in the analogous situation of trade union fee payments by non-members who do not wish to contribute to political/ideological/lobbying, a



legislature may not require enforced contributions to such lobbying. Consequently, KELLER's forced membership and dues payments are infringements on the right not to associate recognized by the *Abood* case and its progeny.

This Court, beginning with its decision in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957), has held that ideological tests may not be used to deprive a person of admission to the bar, if they are otherwise qualified. Like KELLER, Gibson meets all requirements for admission (he was admitted in 1964) and for retaining his membership in The Florida Bar, including education, being of good character, continuing education and examination requirements. The state simply lacks the power to require in addition to such requirements that a prospective lawyer or already admitted lawyer make involuntary monetary contributions to allow ideological lobbying on partisan political issues unrelated to:

a) the regulation of attorneys;
b) law school admissions and bar admissions;
c) legal aid appropriations and judicial salaries;
d) regulation of trust accounts;
e) litigation procedures.

See *Gibson* v. *The Florida Bar*, 798 F.2d at 1569, note 4. If political beliefs are irrelevant and improper bases for determining admission to the bar, or retention of legal employment, such ideological tests are also improper and irrelevant to the retention of bar membership.

Such protections have been made available to other groups such as railroad workers, (*Ellis*); public school teachers; (*Abood* and *Chicago Teachers*); assistant public prosecutors (*Branti*) and communications workers (*CWA* vs. *Beck*, 487 U.S. ____, 101 L. Ed 2d 634(1988)). The Court should now find that whether enacted by a Court or by a state legislature, bar dues or a fee called a "tax" imposed solely on lawyers as a precondition of being a member of the bar, are subject to First Amendment limitations on such expenditures for ideological reasons.

The legal profession is a part of interstate commerce. A state may not precondition the fundamental right of exercising a profession, for which KELLER is qualified and which is interstate commerce, on a waiver of First Amendment constitutional rights.

Amicus further urges that this Court, after finding that this matter is governed by the *Abood* line of cases, take this occasion to amplify the specific procedures required for the use of dues and hold that in all cases of publicly compelled association as a requirement for employment that the appropriate "least restrictive means" is a "positive



checkoff" allowing dissenters to pay only the non-ideological fee, and, that the Court further rule that "unions" or "bar associations" must allocate overhead that supports lobbying to the amount permitted for checkoff.

Recent decisions of lower Courts, and this Court's decision in *Lathrop* v. *Dononhue*, 367 U.S. 820(1961) recognize that a state may compel membership in state integrated bar associations as a precondition of practicing law. Such compelled membership countenances a significant intrusion into the First Amendment rights of attorneys. Unlike union cases, in which a person can be compelled to pay service charges, but not to join, attorneys must both pay and belong to the bar in "integrated states." Therefore Gibson argues that additional First Amendment protection must be given to attorneys since they must join the bar. Amicus notes that it is clearly possible for laypersons to assume that since all attorneys belong to the bar association that all attorneys agree with the partisan political positions taken by the Bar. To avoid such an erroneous conclusion and to protect the "non-associational" rights of dissenters, it is submitted that this Court now establish that the Bar must place a disclaimer on writings and otherwise appropriately note that the position is only that of members who voluntarily agree to contribute to lobbying.

## ARGUMENT

### I.

### THE FIRST AMENDMENT CONTROLS THE CALIFORNIA LEGISLATURE'S IMPOSITION OF FEES REQUIRED TO PRACTICE LAW SO LONG AS THE FEES ARE USED FOR LOBBYING

All of the lower Courts (except *Keller*) which have considered the issue have found that bar dues are analogous to union dues, and in particular union "service charges" paid by those who do not wish to belong to the union, or who disagree with lobbying on political / ideological issues that the union seeks to foster. See: *Gibson* v. *The Florida Bar*, 798 F.2d 1564(11th. Cir. 1986); *Arrow* v. *Dow*, 544 F.Supp. 458(D.N.M. 1982); *Romany* v. *Colegio de Abagados*, 742 F.2d 32(1st. Cir. 1984); *Virgin Islands Bar* vs. *Government of Virgin Islands*, 648 F.Supp. 170(D.Virgin Islands 1986); *In re The Florida Bar*, 439 So. 2d. 213(Fla. 1983).[1]

1. The Florida Supreme Court correctly recognized that the First Amendment and the *Abood* line of cases governed the collection and expenditure of bar dues, but incorrectly found the lobbying that the Florida Bar engaged in was within the limits on such lobbying. CF: *The Florida Bar, Re: Thomas Schwartz*, Case No. 70,702, _____ So. 2d _____(Fla. 1989)10-26-89, reproduced in appendix page 1.



The Florida Supreme Court has recently handed down its opinion in *The Florida Bar, Re: Thomas Schwartz*, Case No. 70,702, 10-26-89, Reproduced in Appendix 1, which opinion can be fairly charcterized as bereft of First Amendment analysis, save the dissent. However, this opinion does not recede from or overrule *In Re the Florida Bar*, 439 So.2d 213(Fla. 1983) or *Florida Bar Re: Amendment to Rule 2-9.3*, 526 So. 2d 688(Fla. 1988) which did recognize the applicability of *Abood* and other First Amendment cases to bar dues. These decisions correctly decided this issue, since for constitutional purposes, however it may be chartered, an organization to which a person must pay and must join as a precondition of exercising the fundamental right to pursue his chosen, lawful, occupation is nevertheless bound to observe an individual's constitutional rights. Such a requirement creates an infringement on the First Amendment rights "not to associate," "not to speak" and "not to be compelled to pay even 'three pence' to support an ideological cause." The record in this case, as the decision in the Gibson case, is replete with proof that the Bar has, and will continue, to lobby on ideological issues beyond those recognized in the various cases as being within the limited scope of appropriate ideological activity. Similarly, The Florida Bar has taken positions which were determined to be by the Eleventh Circuit beyond the limited scope for the use of compulsory dues for lobbying. The Florida Bar has taken positions inter alia, on the regulation of child care centers,

"tort non-reform," opposing changes in the state sales tax, among others. *Gibson* v. *The Florida Bar* 798 F.2d at 1564. California seeks to distinguish its bar regulation from that of the other jurisdictions by noting that the California legislature has approved the Bar's use of compulsory fees for lobbying. The reasoning that the California Supreme Court used to justify the lobbying by the California Bar is specious and has already been adversely decided by such cases as *Ellis* v. *Brotherhood*. The core holding, made over twenty years ago and repeatedly reaffirmed by such cases as *Abood* is that although a legislature and by analogy a Court acting in an administrative capacity can regulate professions and require payment of "service charges" such charges cannot include the payment of monies used for ideological activities over dissent. If the Congress of the United States, (*International Associations of Machinists* v. *Street*, 367 U.S. 740(1961); and the Michigan legislature (*Abood* v. *Detroit Board*, 431 U.S. 209(1977), the Illinois legislature (*Chicago Teacher's*, 475 U.S. 292(1986)) can not do so, neither can the California legislature.

As this Court noted in *Brotherhood of Railroad Trainmen* v. *Virginia*. 377 U.S. 1(1964):

> Virginia undoubtedly has broad powers to regulate the practice of law within its borders; but we have had occasion in the past to recognize that in regulating the practice of law a state cannot ignore the rights of individuals secured by the Constitution. at 377 U.S. page 6.



This Court has considered "bar admissions" cases on many occasions. Gibson urges that what a Bar association, whether created by a legislature or by a Court, cannot do during the process of admitting one to the Bar, it further cannot do in setting dues or establishing requirements to retain the ability to practice law.

It is apodictic that a state may not require an individual to waive one constitutional right as a precondition to exercising another constitutional right. California's rules appears to require that attorneys totally surrender the First Amendment right "not to associate" and freedom from being forced to make "compelled contributions" to ideological causes. As stated by this Court in *Baird* v. *State Bar of Arizona*, 401 U.S. 1 at U.S. 8, "The practice of law is not a matter of grace, **but of right** for one who is qualified by his learning and moral character." (emphasis supplied).

In *Schware* v. *Board of Bar Examiners*, 353 U.S. 232(1957), this Court held:

> A state can require high standards of qualification, such as good moral character or proficiency in its law before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a state cannot exclude an applicant when there is no basis for find-

ing that he fails to meet these standards, or when their action is invidiously discriminatory. *Schware*. 353 U.S. at 239. (Citations omitted.)

Thus, by equal force of logic a state cannot require that an attorney in order to retain membership in the Bar, subscribe to and make involuntary financial contributions to support ideological causes with which the attorney may disagree.

> The First Amendment's protection of association prohibits a state from excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs. Similarly, when a state attempts to make inquires about a person's beliefs or associations, its power is limited by the First Amendment. Broad and sweeping state inquiries into these protected areas, as Arizona has engaged in here, discourages citizens from exercising rights protected by the Constitution. When a state seeks to inquire about an individual's beliefs and associations a heavy burden lies upon it to show that the inquiry is necessary to protect a legitimate state interest. *Baird* v. *Arizona*, 401 U.S. 1(1971) at 6-7.

For this reason alone the decision of the California Supreme Court was in error, and should be reversed with directions to find that the California legislative scheme is forbidden by the First Amendment rights recognized in *Abood* and such cases as *Gibson* v. *The Florida Bar*.



## II.

## ATTORNEYS HAVE THE SAME CONSTITUTIONAL RIGHTS AS THOSE IN OTHER FIELDS OF ENDEAVOR

In many ways the practice of law is a different sort of calling than other professions. Since attorneys have such a close connection with the justice system, this court has in dicta and otherwise recognized that there are reasons to distinguish lawyers from other occupational groups. Thus, attorneys may be called upon to perform pro bono service, and have an obligation to do so. The idea that a pipefitter or electrician could be compelled by the state body regulating him or her to perform free work would most likely be struck down as "involuntary servitude" or perhaps as the taking of property without compensation and due process.

At the same time that the craft of legal advocacy is unlike other occupations, it is for First Amendment purposes the same as other professions. In cases such as *Branti* v. *Finkel*, 445 U.S. 507(1980) this court has held that being employed by the state as an attorney is not "confidential" employment that would permit the imposition of a political test for employment. If the state cannot hire or discharge attorneys based on their political beliefs it is equally clear that a state cannot condition membership in the Bar on making enforced political contributions.

It is submitted that attorneys who are forced to join and to pay fees to a Bar Association, even if the same is approved by a state legislature, should have the same constitutional rights as teachers and the other occupations previously ruled upon. To rule otherwise would be tantamount to declaring that the regulation of attorneys has no constitutional limits – a proposition that this Court has again and again rejected.

For the reasons stated, the lower Court should be reversed.

## III.

## THE PRACTICE OF LAW IS PART OF INTERSTATE COMMERCE, AND THE STATES CANNOT CONDITION THE RIGHT FOR A QUALIFIED INDIVIDUAL TO PRACTICE LAW ON A WAIVER OF FIRST AMENDMENT RIGHTS

Attorneys engage in interstate commerce, both by representing non-residents of the states where they may practice, and perhaps by suing non-residents. In addition, attorneys also use the means of interstate commerce such as the telephones, mails and airlines. As society becomes more mobile, the number of individuals holding multiple bar memberships increases, as does the number of attor-



neys practicing in more than one jurisdiction. The Florida Bar, with a membership of approximately 40,000 has over 10,000 out of state members.

This Court has determined that practicing law, provided that one is otherwise qualified by education or other fitness requirements, is a "fundamental right" see *Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274(1985) for the purposes of the privileges and immunity clause.

The practice of law has been found by this Court to impact upon interstate commerce; and in fact, the legal profession as a whole is engaged in interstate commerce. As this Court noted in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773(1975) the "activities of lawyers play an important part in commercial intercourse" (at U.S. page 788.) A state may not precondition the privilege of engaging in interstate commerce on a waiver of federal constitutional rights. *Terral, Secretary of State of Arkansas* v. *Burke Construction*, 257 U.S. 529(1922). "There are rights of constitutional stature whose exercise a state may not condition by the exaction of a price. Engaging in interstate commerce is one." *Garrity* v. *State of New Jersey*, 385 U.S. 493(1967) at 500. The majority opinion of the California Supreme Court attempts to distinguish this case from the other bar dues cases because the California legislature has

determined that the Bar may lobby. Indeed the California legislature has done so; but it is still an unconstitutional coercion of a waiver of fundamental rights and privileges.

The right for an otherwise qualified person to practice law may not be denied in the absence of a "substantial reason." *Supreme Court of N.H.* vs. *Piper*, 470 U.S. 272(1985) at 277. Each case that has considered the issue has found that there is no "substantial reason" to override the First Amendment in regard to union or bar dues used for ideological purposes, save *Keller*.

Accordingly, the California Supreme Court's finding that there is no constitutional barrier to the exaction of service fees from attorneys when the fees are then used to fund ideological lobbying should be reversed.

## IV.

## THE APPROPRIATE REMEDY IS A POSITIVE CHECKOFF SYSTEM

*Chicago Teachers* v. *Hudson*, 475 U.S. 292(1986) established if it is permissible for a state to require that individuals join a particular organization as a requirement of employment, that the First Amendment limits the exaction of dues, over dissent, for ideological activity unrelated to the permissible central purpose of the organization. Further, *Chicago Teacher's* also established that the least



restrictive means are required to be used, since the payment implicates the First Amendment. "By allowing the union shop at all, we have already countenanced a significant impingement on First Amendment Rights." *Ellis* v. *Railway Clerks*, 466 U.S. 435(1984) at 455-456. "The objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective bargaining activity." *Abood* at 431 U.S. 237.

This Court has already rejected "refund procedures" as being inadequate and constitutionally infirm. The means which is the least restrictive is a positive checkoff, whereby the member of the Bar desiring to contribute to lobbying separately approves the expenditure.

For example:

| | |
|---|---|
| Bar dues: | $200.00 |
| Total dues: | $200.00 |
| Voluntary donation for lobbying: | $50.00 |
| _____ Yes _____ No | |
| Total remitted: | $ _____ |

This means is far less chilling on the potential exercise of rights than is a system which first charges the fee and then allows a "deduction" or other systems.

The Florida Bar's recent regulations on the use of dues for ideological lobbying (which lobbying has now degenerated into taking positions on the dog bite law, federal products liability statutes, and lobbying against making it a "major crime" (sic) to fail to bring a child back on time from visitation) were adopted in response to the decision of the Eleventh Circuit in *Gibson* v. *The Florida Bar*. The observation that the rule change was caused by Gibson's federal suit is contained in the opinion of the Florida Supreme Court itself, 526 So. 2d 688 (Fla. 1988), adopting new legislative lobbying rules. Amicus suggests that this is an example of an unconstitutional, unduly restrictive system.

Rule 2.92 of the *Bylaws of the Florida Bar* provides in part:

> (b) Publication of legislative positions. The Florida Bar shall publish notice of adoption of legislative positions in The Florida Bar News, in the issue immediately following the board meeting at which the positions were adopted.
>
> (c) Objection to legislative positions of The Florida Bar. Any active member of The Florida Bar may, within forty-five (45) days of the date of publication of notice of adoption of a legislative position, file with the executive director a written objection to a particular position on a legislative issue. Failure to object within this time period shall constitute a waiver of any right to object to the particular legislative issue.
>
> (1) After a written objection has been received, the executive director shall promptly determine the pro rata amount of



> the objecting member's dues at issue and such amount shall be placed in escrow pending determination of the merits of the objection. The escrow figure shall be independently verified by a certified public accountant.
>
> (2) Upon the deadline for receipt of written objection, the board of governors shall have forty-five (45) days in which to decide whether to give a pro rata refund to the objecting members or to refer the action to arbitration. [Subparts relating to arbitration omitted]
>
> (3) The arbitration panel shall thereafter render a final written report to the objecting member(s) and the board of governors within forty-five (45) days of its construction.
>
> (4) In the event the arbitration panel orders a refund, the Florida Bar shall provide such refund within thirty (30) days of the date of the arbitration panel's report, together with interest calculated at the legal rate of interest as of the date the written objection was received by The Florida Bar.

The Florida Bar's procedure adopted by the Florida Supreme Court after *Chicago Teachers*, as well as its decision in *The Florida Bar, Re: Thomas R. Schwartz*, Case No. 70,702, 10-26-89, _____ So. 2d. ____, (Fla. 1989) illustrates the need for this Court to clearly establish a "bright line" rule that mandates what procedure is required as a remedy in First Amendment – bar dues matters.

It is respectfully submitted that the *Chicago Teacher's* opinion requires an advance reduction, together with an escrow should there be a dispute as to the correct amount of the deduction. To limit litigation as to remedy and to provide guidance to the lower Courts, it is respectfully requested that the Court now find that a positive checkoff is the minimum required. Such rule would have the advantage of limiting the need for serial re-appeals, as has been the case in *Gibson* v. *The Florida Bar* to determine the correctness of remedies adopted once the First Amendment is found to be implicated by lobbying done by the bar association or other entity.

The infringement of First Amendment rights is an irreparable injury. The provision by this Court of specific guidance as to remedy will shorten such litigation, thus lessening any injury which parties may suffer. This Court is respectfully requested to rule on this issue in this case as there is significant litigation involving remedy currently pending in the lower Courts that such guidance will materially aid and since, as is argued in point V, attorney's associational rights suffer a greater impact than that of other occupational groups.



## V.

## TO MINIMIZE THE FIRST AMENDMENT INJURY, A DISCLAIMER SHOULD BE MANDATED BY THIS COURT

As noted in the opinion by the California Court of Appeals, KELLER suffered two distinct injuries. The first is the compelled subsidization of the ideological positions of the California State Bar, the second is being forced to "add his voice" to the California State Bar. In short, being required to join the organization, unlike other occupational groups who only must pay non-ideological "service" charges creates a second injury.

Unlike the other First Amendment / compulsory contribution litigation the Courts to date appear to require that attorneys both pay "service charges" and join integrated Bars. This Court has permitted compelled payment in the past, but only in the special area of attorneys has this Court permitted the additional First Amendment injury of compelled association — that is, joining the organization is also compelled. See *Lathrop* v. *Donohue*, 367 U.S. 820(1961).

This issue was not decided in the initial First Amendment challenge to bar membership, *Lathrop* v. *Donohue*. There have been challenges to such membership requirements in recent times, see *Levine* v. *Heffernan*, 864 F.2d

457(7th Cir. 1989). In such challenges the Bar has prevailed. Assuming arguendo that this Court would decide that Bar membership can be compelled, it would then have permitted a great diminution of First Amendment rights. However, there is no compelling state interest in misleading members of the public into believing that all attorneys agree with the positions that the Bar takes. Since a large intrusion is apparently appropriate, a clearly larger degree of protection should be provided to the dissenting attorney. Such protection at a minimum would reduce the risk that the public might think that the ideological positions advocated by the Bar are in fact those of the all the attorneys. Given that the Court is being asked by this amicus and petitioner to extend First Amendment protections to attorney's bar dues, the Court should also address the rights of dissenters, albeit members, to be able to disclaim the positions taken by the Bar in this manner. Thus the Bar should be mandated to place a warning or disclaimer on written material which it circulates noting that the opinion is not that of all the attorney's in the State, and in other advocacy that the Bar also make known the fact that there are dissenters, who are not being represented by the Bar. Such a rule protects attorneys from having the Bar's views wrongfully attributed to them and from being obligated to speak to make their disagreement known. Requiring such a disclaimer will avoid compelling the Bar members to speak (a right recognized to



arise out of the First Amendment) and place the burden on the appropriate party, namely the Bar which insists on lobbying.

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## CONCLUSION

For the reasons stated the decree of the California Supreme Court should be vacated with instructions to provide appropriate First Amendment protection to KELLER.

Dated: November ____, 1989

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**APPENDIX**

**No. 70,702**

**In The**

**Supreme Court of Florida**

**[October 26, 1989]**

THE FLORIDA BAR
Re: THOMAS R. SCHWARZ

This is a continuation of *The Florida Bar re Schwarz*, 526 So.2d 56 (Fla. 1988), on the issue of what lobbying activities of The Florida Bar are permissible. As a creation of this Court, The Florida Bar is under our supervision and subject to our regulation.

In the original *Schwarz* opinion, we referred this matter to the Judicial Council for its comments and recommendations. The Council conducted public hearings on the subject. In its report, the Council first concluded that The Florida Bar could constitutionally engage in activities directed toward the administration of justice and the advancement of the science of jurisprudence. The report then stated:



> The integrated bar offers specialized skills, training, education, and experience with which to serve in an advisory function to the various branches of state government. The Council submits that the advice of the Bar is important to the legislature's deliberations within areas pertaining to the administration of justice. These issues may frequently be technical and complex and have effects not otherwise contemplated by the legislation. It appears that the Bar has an obligation, grounded upon the mandate of the integration rule setting forth the Bar's very purpose for existence, to speak out on appropriate issues concerning the courts and the administration of justice and advise the legislative and executive branches of government of its collective wisdom with respect to these matters. To prohibit such communication would work a grave disservice to the people of this state and would infringe upon the free speech of the great majority of the state's attorneys. The Florida Bar has a reputation of pursuing improvements in the administration of justice and science of jurisprudence. The relative weight to be accorded these compelling interests appears to be of such great importance as to fully justify the relatively insignificant intrusion occasionally experienced by dissenting members of the Bar.

*Judicial Council of Florida, Special Report to the Florida Supreme Court on Legislative Activities of The Florida Bar* 6-7 (Dec. 1988) (on file with the Florida Supreme Court) [hereinafter Special Report on Legislative Activities]. In seeking to define the administration of justice and the advancement of the science of jurisprudence, the Council recommended that the following subject areas be recognized as clearly justifying legislative activities by the Bar:

(1) Questions concerning the regulation and discipline of attorneys;

(2) matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency;

(3) increasing the availability of legal services to society;

(4) regulation of attorneys' client trust accounts; and

(5) the education, ethics, competence, integrity, and regulation as a body, of the legal profession.

*Special Report on Legislative Activities*, supra, at 9. The Council also recommended that the following additional criteria be used to determine "the type of proposed legislative initiatives the Bar may become actively involved with when the legislation appears to fall outside of the above specifically identified areas:"

(1) That the issue be recognized as being of great public interest;

(2) that lawyers are especially suited by their training and experience to evaluate and explain the issue; and

(3) the subject matter affects the rights of those likely to come into contact with the judicial system.

Thereafter, we entertained comments in response to the report and heard oral argument on the subject. Upon consideration, we have concluded that the Council's recommendations are well taken.



The Florida Bar was integrated by this Court in *Petition of Florida State Bar Association*, 40 So.2d 902 (Fla. 1949). Justice Terrell, writing for the majority, defined the integrated bar "as the process by which every member of the bar is given an opportunity to do his part in performing the public service expected of him, and by which each member is obliged to bear his portion of the responsibility." Id. at 904. He further stated that integration "provides a fair and equitable method by which every lawyer may participate in and help bear the burden of carrying on the activities of the bar instead of resting that duty on a voluntary association composed of a minority membership." Id.

As noted by Justice Terrell:

> Bar integration grew from a felt necessity for an organization that could speak for the profession in esse. It is not a compulsory union but a necessary one to secure the composite judgment of the bar on questions involving its duty to the profession and the public . . . .
>
> . . . . The assault on our institutions which the bar is expected to take the leading role in challenging also requires the full manpower of the bar. We do not think bar integration would be worth the candle as a specific for unethical conduct, but as a means of giving the bar a new and enlarged concept of its place in our social and economic pattern . . . .

Id. at 908 (emphasis added).

In 1969 this Court denied a petition seeking to prevent the Board of Governors of The Florida Bar from lobbying for the adoption of the proposed revision of the Florida Constitution. *In re Florida Bar Board of Governors Action*, 217 So.2d 323 (Fla. 1969). In a concurring opinion, Justice Hopping succinctly observed:

> Since the inception of The Florida Bar, the Board of Governors has faced up to its professional responsibility of acting in the spirit of public service and has prepared and advocated adoption by the State Legislature of numerous enactments, including the *Mechanics' Lien Law*, the *Uniform Commercial Code*, the *Public Defenders' Act*, the law providing for filing of administrative rules in the Office of the Secretary of State, and major reforms in the substantive law of this State. It has sponsored adoption by the Legislature and the electorate of Florida, several constitutional amendments including the amendment creating the District Courts of Appeal and the Judicial Qualifications Commission. It has consistently advocated in the Legislature various improvements in the judicial system. Some of these matters were directly related to the administration of justice, some were totally unrelated to the administration of justice, and others were "political" in nature, using the word "political" in its broad sense as pertaining to the organization or administration of government.

Id. at 324 (Hopping, J., concurring).

In 1983 this Court denied a petition seeking to amend the integration rules to prevent the Board of Governors from engaging in any political activity on behalf of The



Florida Bar. *In re Amendment to Integration Rule of The Florida Bar*, 439 So.2d 213 (Fla. 1983). In reaching our conclusion, we pointed out that:

> [P]etitioners are made cognizant of the fact that any attorney "is still free to voice his own views on any subject in any manner he wishes. He can do this even though such views be diametrically opposed to the position taken by the unified bar of his state." *In re Unification of the New Hampshire Bar*, 109 N.H. 260, 266, 248 A.2d 709, 713 (1968). This may take the form of working within The Bar itself or its committees or it may be through external means. But he is never forced to adhere to or proclaim any political view or engage in any personally-repugnant political activity

Id. at 215.

The California Supreme Court recently passed on the lobbying authority of its state bar which levies membership dues without the possibility of partial rebate. Reasoning that the words "advancement of the science of jurisprudence" and "improvement of administration of justice" should be read broadly in the context of lobbying activities, the court held that the bar was authorized to comment generally upon proposed legislation. *Keller* v. *The State Bar of California*, 47 Cal.3d 1152, 767 P.2d 1020, 255 Cal. Rptr. 542 (1989), cert. granted, ___ S. Ct. ___ (Oct. 2, 1989). While the decision was broader than the one we reach today, we find most pertinent the following observation of the California court:

> Laws are the business of lawyers. The drafting of a proposed law, the understanding of the relationship between that law and existing legislation, and the appreciation of the practical impact of the proposed legislation are matters which often require expert legal knowledge and judgment. Whatever the subject of the proposed law, it is likely that among the members of the State Bar are some with the needed expertise, whose collective advice can lead to significant improvements in the legislative proposal. "The state has a valid interest in drawing upon [lawyers'] training and experience in order to promote improvements in the administration of justice and to advance jurisprudence. The better attuned the legal machinery is to the public's needs of health, safety, and welfare, the better the state will be able to perform its job of protecting and serving the public. The input and feedback on proposed legislation and court rules is invaluable to the state in fine-tuning its legislative and judicial systems."

Id. at ___, 767 P. 2d at 1030-31, 255 Cal. Rptr. at 552 (citation and footnote omitted).

Several portions of the *Rules Regulating The Florida Bar* also support our conclusion. Thus, rule 1-2 states:

> The purpose of The Florida Bar shall be to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence.

Rule 2-3.2 of the *Rules Regulating the Florida Bar* further provides:



> Subject to the continued direction and supervision by the Supreme Court of Florida, the board of governors may, by amendment to this chapter, take all necessary action to:
>
> ....
>
> (c) Establish, maintain and supervise:
>
> ....
>
> (4) A program for providing information and advice to the courts and other branches of government concerning current law and proposed or contemplated changes in the law.

Most significantly, rule 2-9.3 of the *Rules Regulating The Florida Bar* specifies in part:

> **RULE 2-9.3 LEGISLATIVE POLICIES**
>
> (a) The board of governors shall adopt and may repeal or amend rules of procedure governing the legislative activities of The Florida Bar in the same manner as provided in rule 2-9.2; provided, however, that the adoption of any legislative position shall require the affirmative vote of two-thirds of those present at any regular meeting of the board of governors or two-thirds of the executive committee or by the president, as provided in the rules of procedure governing legislative activities.

This rule insures that The Florida Bar will take a legislative position only after first independently focusing on the question of whether the subject matter is one in which the organized bar should become actively involved In reaching this determination, the Board of Governors should refer to the criteria set forth in this opinion.

However, we also suggest that the Board exercise caution in the selection of subjects upon which to take a legislative position so as to avoid, to the extent possible, those issues which carry the potential of deep philosophical or emotional division among the membership of the Bar. In any event, we also wish to make clear that any member of The Florida Bar in good standing may question the propriety of any legislative position taken by the Board of Governors by filing a timely petition with this Court.

In *The Florida Bar re Amendment to Rule 2-9.3*, 526 So.2d 688 (Fla. 1988), we approved an amendment to the *Rules Regulating The Florida Bar* to provide the mechanism for a lawyer who objects to legislative positions taken by The Florida Bar to obtain a partial rebate of bar dues. As part of the process, The Florida Bar is required to publish notice of adoption of legislative positions in *The Florida Bar News* in the issue immediately following the board meeting at which the positions are adopted. In this manner, lawyers are alerted to the legislative positions being taken by The Florida Bar and by registering their objections they may be relieved of paying for their share of the expense attributable to the advocacy of the legislative positions with which they disagree. Consistent with the response filed by The Florida Bar in this action, we ask the Board of Governors to submit proposed amendments to this rule which will make clear that the



Bar carries the burden of proof in such proceedings and providing that the names of objecting bar members, at their option, be kept private.

We approve the recommendations of the Judicial Council and adopt them as guidelines to be followed with respect to determining the scope of permissible lobbying activities of The Florida Bar.

It is so ordered.

EHRLICH, C.J., and OVERTON, SHAW, BARKETT and KOGAN, JJ., Concur

McDONALD, J., Dissents with an opinion

**NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.**

McDONALD, J., dissenting.

I would limit the lobbying activities of The Florida Bar to the five subject areas which the Judicial Council recognized as "clearly justifying legislative activities" by the bar.

While there is some question on portions of the five subjects that the council finds clearly justified, the overwhelming view is that it is appropriate for The Florida Bar to participate in legislative activities in these designated

areas. Few disagree that these areas fall within the stated purpose of the mandated membership of The Florida Bar. On the other hand, though supported by the majority of the board of governors of The Florida Bar, the council's suggestion that the bar may lobby on issues of great public interest and in matters that lawyers are especially suited to and that affect the rights of those likely to come into contact with the judicial system has drawn serious comments and criticism. Some suggest that these criteria are so broad as to be a complete exception to any set of principles. I agree with this.

What distinguishes The Florida Bar from most other organizations is that all lawyers licensed in Florida must belong to it in order to practice their profession. It is this compulsory membership requirement that presents the strongest obstacle to the bar's discretionary lobbying under discussion. Many lawyers, because of their clients' interests or personal predilections, are in disagreement with positions of The Florida Bar on substantive issues and yet are compelled to be a member of an association espousing causes contrary to their beliefs. This presents some first amendment implications. Even without this concern, it appears to be that, except for matters directly attributable to the purpose of The Florida Bar, it is unwise and improper to compel membership and extract dues for causes or political goals antithetical to the beliefs or interests of individual members. In those matters falling outside the direct stated purpose of The Florida Bar it is better to leave lobbying activities to voluntary bar groups such as sections, political action committees, and the like. The lobbying activity of The Florida Bar should be restricted to the five "clearly justified" areas described in the council's report.



The majority does recognize that before taking legislative action it is incumbent on the board of governors first to find that the subject matter is one in which the organized bar should become actively involved. That decision should be determined on whether the proposed action comes within the definition of the stated purposes of The Florida Bar and as restricted by the five clearly defined areas.

I heartily approve of the concept that ready access to this Court be provided for a speedy resolution of issues questioning the propriety of the bar's lobbying decisions. I trust that the board will act with such circumspection that such challenges will be few and without merit. This will be true if lobbying activities not clearly within the stated purposes of The Florida Bar are left with individual sections, or special groups. No restrictions extend to individual members of the bar; restrictions do and should extend to activities by or in the name of The Florida Bar.

Original Proceeding - The Florida Bar

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Joseph W. Little, Gainesville, Florida; Ben L. Bryan, Jr. of Fee, Bryan, & Koblegard, P.A., Ft. Pierce, Florida; and Henry P. Trawick, Jr., Sarasota, Florida

Responding to Report

Rutledge R. Liles, President, Jacksonville, Florida; Stephen N. Zack, President-elect, Miami, Florida; John F. Harkness, Jr., Executive Director, John A. Boggs, Director of Lawyer Regulation, and Paul F. Hill, General Counsel, Tallahassee, Florida; and Barry Richard of Roberts, Baggett, LaFace, & Richard, Tallahassee, Florida,

for The Florida Bar, Respondent